Larry Lewis Motors, Inc. and Cary Utterback and District No. 71, International Association of Machinists and Aerospace Workers, AFL-CIO and International Brotherhood of Teamsters Local 522, Jointly. Cases 17-CA-10016, 17-CA-10020, and 17-RC-9127

June 21, 1982

DECISION, ORDER, AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On September 15, 1981, Administrative Law Judge Clifford H. Anderson issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions with a supporting brief and filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Larry Lewis Motors, Inc., Platte City, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

IT IS FURTHER ORDERED that the Union's objections be, and they hereby are, dismissed, and that the results of the election conducted by the Board in Case 17-RC-9127 be, and they hereby are, certified.

CERTIFICATION OF RESULTS OF ELECTION

It is hereby certified that a majority of the valid ballots have not been cast for District No. 71, International Association of Machinists and Aerospace Workers, AFL-CIO and International Brotherhood of Teamsters Local 522, Jointly, and that said labor organizations are not the exclusive representative of all the employees, in the unit herein involved, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge: This proceeding was heard before me on June 11, 1981, in Kansas City, Kansas. The cases arose as follows: on November 5, 1980, Cary Utterback, an individual, filed a charge in Case 17-CA-10016, and amended the charge on November 20, 1980, against Larry Lewis Motors, Inc. (Respondent or the Employer). On November 25, 1980, the Regional Director for Region 17 of the National Labor Relations Board (the Regional Director and the Board, respectively) issued a complaint and notice of hearing with respect to this case.

On November 7, 1980, District No. 71, International Association of Machinists and Aerospace Workers, AFL-CIO and International Brotherhood of Teamsters Local 522, Jointly (the Union or the Petitioner), filed a charge and amended the charge on December 22, 1980, against Respondent. On December 19, 1980, the Acting Regional Director issued an order consolidating cases, consolidated complaint and notice of hearing with respect to these two cases.

On October 1, 1980, the Union filed a petition in Case 17-RC-9127 seeking to represent certain of Respondent's employees. Pursuant to a Stipulation for Certification Upon Consent Election approved by the Regional Director on October 14, 1980, an election was conducted on October 24, 1980. All of the approximately nine eligible voters cast ballots, with the tally showing seven votes against the Union, one for the Union, and one ballot challenged. On October 30, 1980, the Union filed timely objections to the election. On January 14, 1981, the Regional Director issued an order consolidating cases and directing hearing on objections to election which directed a common hearing concerning the three cases herein.

The amended consolidated complaint, as further amended at the hearing, alleges that Respondent's agents created the impression of surveillance of employees' union activities, laid off employee Utterback because of his union activities, and failed to bargain with the Union. This conduct is alleged to violate Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). Respondent denies the occurrence of improper conduct and further denies that any conduct, were it to have occurred, would in any case justify the imposition of a bargaining obligation on Respondent.

The Union's objections, quoted in full, *infra*, essentially track the allegations of the complaint. The Union seeks to have the results of the election set aside and either a bargaining order or a new election directed. The Employer contends there is no basis to set aside the election.

¹ Chairman Van de Water, in adopting the finding that Foreman Kossen's comments to Utterback created an impression of surveillance, does not rely on *PPG Industries, Inc.*, 251 NLRB 1146 (1980), with which he does not agree.

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation engaged in the retail sale, service, and repair of automobiles in Platte City, Missouri. During the course of its business operations, Respondent annually enjoys revenues in excess of \$500,000 and purchases goods and services directly from sources outside the State of Missouri of a value in excess of \$50,000.

II. LABOR ORGANIZATION

The Union, jointly and/or on an individual basis, exists for the purpose, in whole or in part, of dealing with employees concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Employer had for many years operated an automobile sales and service facility in Platte City, Missouri, including a body shop which undertakes repair and restoration of damaged automobiles. Larry Lewis, for a period of years preceding the date of the hearing, has been the corporate president and active manager at the facility. Charles Kossen is the body shop foreman with some 12 years' service with Respondent. Each is an admitted supervisor and agent of the Employer. Until September 1980, 1 other employees employed in the body shop were: Cary Utterback, who at that time had some 4 years' seniority, James Parker, who at that time had some 3 years' seniority, and Herman Sachse, who at that time had but a few months' seniority.

Utterback contacted the Union on September 19 and signed a union authorization card on September 22. He was the principal union organizer at the facility and procured a total of seven authorization cards, including his own, by the following day. In the days following his initial contact with the Union, Utterback received numerous telephone calls at work from the Union and spoke to employees regarding authorization cards and the Union at the facility.

The Union mailed a letter to the Employer dated September 23 announcing that it was organizing at Respondent. On September 24 the Union sent a letter to the Employer demanding recognition of the Union as the collective-bargaining representative of the employees. On October 1, the Union filed the petition in the above captioned representation case.

B. The Surveillance Allegation

Parker had not been working since early September when he visited the facility on September 24. The Union's initial letter was received by the Employer that day. Lewis read the letter on its receipt and immediately thereafter discussed the matter with Kossen.

Parker testified that he received a telephone call the morning of September 24 in the body shop from Judith Minyard, then working in the office, and, at her request, passed the phone to Utterback. Utterback testified that Minyard told him that Lewis had received "his letter and that he was not too happy." Minyard did not recall this conversation. I credit Parker and Utterback as to these events. First, Minyard, who had signed an authorization card the day before, would be likely to have an opportunity to observe and an interest in reporting management's reaction to a letter from the Union. Her testimony that she did not recall the phone call seemed to me to be a convenient failure to recall an action she may now be reluctant to acknowledge. The versions of Parker and Otterback are corroborative. They would be unlikely to fabricate testimony on such a minor matter. Finally, the call is not inconsistent with other events of the day.

Parker and Utterback went to lunch. Upon their return, Parker went to Lewis' office and there had a conversation with Lewis. At the conclusion, Parker, aware his employment relationship with Respondent was concluded, went to the body shop area and obtained Utterback's assistance in loading his tools into his truck.²

Parker testified that during their loading, Kossen approached them and said to Utterback, "Cary, they know who is behind this union, getting this union started." He further recalled that Utterback did not directly answer but rather made a "humm" sound, whereupon Kossen pointed at Utterback and said "Yeah you" and walked away. Utterback testified that Kossen told him "that they knew who was trying to organize a union, bring it in and, then he pointed a finger at me and said 'It was you.""

Kossen places the tool loading incident as occurring 1, 2, or 3 days before he learned of any union activities at the facility. He testified he learned of the union activity on September 24 from Lewis who called him in and showed him the letter he received from the Union. Further, while he recalled the loading of Parker's tools by Parker and Utterback, he denied making the remarks attributed to him at that time or any other.

First, I place the conversation as occurring on September 24 not earlier as recalled by Kossen. I have credited the testimony of Parker and Utterback concerning the phone call of Minyard. I further credit their testimony which fixes the conversation as occurring the day that Lewis received a letter from the Union. Lewis and Kossen agreed they discussed the letter on September 24.

Second, I credit the testimony of Utterback and Parker over Kossen as to the substance of the conversation including the remarks attributed to Kossen. I make this finding primarily on the superior demeanor of Utterback and Parker over Kossen as to this aspect of their testimony. Further, it again appears to me that Kossen may be failing to recall a spontaneous remark made hard upon learning of the union matter, which remark he now has cause to regret having made. In making this credibility resolution, I have considered the interest of both Ut-

¹ All dates hereinafter refer to 1980 unless otherwise indicated.

² Parker owned various body shop tools of a value exceeding several thousand dollars which he had used in his employment by Respondent.

terback and Parker³ in shaping their testimony as well as the fact that there was some confusion as to the time and date of the conversation. Kossen's remarks would unlikely be misrecalled save through conscious misstatement. I do not believe that either Parker or Utterback, each of whose demeanor was sound, did other than honestly testify.

I find therefore that Respondent's admitted agent, Kossen, told Utterback that Respondent knew it was Utterback who was organizing the Union at the facility. Such conduct violates Section 8(a)(1) of the Act for its chills employees' right to engage in union activities when an employer creates the impression that their union activities are under observation. Kossen's remark to Utterback, in Parker's presence, can have no other effect here. Accordingly, I find that Respondent has thereby violated Section 8(a)(1) of the Act. Top Security Patrol, Inc., 226 NLRB 46, 49 (1976).

C. The Allegation as to Utterback

The circumstances of Utterback's layoff are not disputed. Utterback was laid off on October 3. He received a letter from the Employer on October 6 telling him his layoff was because of lack of work and informing him that when the "work load increases" he would be recalled. Utterback's layoff followed Parker's termination and together their separations reduced the staff of the body shop from four to two. Utterback has not been recalled and the body shop, from Utterback's layoff to the time of the hearing, remained staffed by the two remaining employees, Kossen and Sachse.

As Respondent counsel acknowledged in his opening statement, the timing of the layoff of the union organizer 2 days after the Union filed a representation petition is suspicious. So too is the fact that Utterback was a long-time employee who was laid off while a very inexperienced employee, with but a few months' seniority, was retained. My finding that Kossen told Utterback on September 24 that his union organizing activities were known to Respondent is a significant additional finding adverse to Respondent. Given all of the above, it is clear, and I find, that the General Counsel has established its prima facie case that Utterback was laid off because of his leadership role in attempting to organize a union at the facility.

The General Counsel's prima facie case having been made, the burden then shifts to Respondent to show that Utterback would have been laid off even in the absence

^a Parker has arguable bias against Respondent as a result of his belief he was improperly terminated. He was the subject of an 8(a)(3) charge against Respondent which was dismissed by the Regional Director. of any wrongful or illegal motive. Wright Line, a Division of Wright Line, Inc., 251 NLRB 1083 (1980). Respondent's defense on this record may be said to have two parts. First, is the proposition that an employee in the body shop would have been laid off on or about October 3. Second, is the proposition that, given a layoff would occur, Utterback would have been the individual selected for layoff.

There seems to be little dispute, and I find, that Respondent had ample business justification for laying off a body shop employee on October 3. Nor is there any contention or evidence offered by the General Counsel to contest the proposition that Respondent's body shop business volume has remained at such a level so as to justify no more that the remaining two employees in the body shop until at least the time of the hearing. I find therefore that Respondent did not make the decision to lay off a body shop employee on October 3 because of the union activity at the facility. As to this aapect of its defense, Respondent has met its burden.

The apparent thrust of the General Counsel's case herein is that Respondent selected Utterback for the layoff because of his union activities and that, absent such illegal motivation, newer employee Sachse would have been laid off. This issue was substantially litigated by Respondent. For the reasons set forth below, I am convinced that Respondent has met its burden of showing that Utterback would have been selected for the layoff absent any knowledge of his or others' union activities and that, accordingly, Respondent having met its burden, the General Counsel's allegation must fail.

Utterback was admittedly a highly skilled employee who was capable of producing and who had produced excellent work. Respondent does not contend that Utterback could not do work of sufficient quality to justify his retention over new employee Sachse. Rather, Respondent took the position that Utterback had over a period of time become erratic in his performance. Thus, his attendance was irregular, he would undertake or accept only certain work and was tardy or inattentive in completing certain tasks, and certain of the assignments he accepted were not satisfactorily done. Respondent's evidence in support of these assertions was essentially unrebutted by the General Counsel. Otterback testified generally as part of the General Counsel's case that he had not even a "hint" of a problem with the Employer or Kossen regarding his work. Regarding the adequacy of particular repair jobs, Utterback testified that, if his work had not been adequate, Respondent should not have "sold the job to the people. It should have stayed in the shop." Respondent in its case presented substantial testimony from Kossen regarding various work errors by Utterback which were part of the basis for Kossen's ultimate recommendation that Utterback be laid off in preference to Sachse. He testified at length and with the specificity regarding Utterback's work habits and attitudes. The General Counsel did not call Utterback to the stand to rebut or otherwise explain this damaging testimony which I

Two other factors support Respondent's contentions. First, it is not disputed that Respondent regards Utter-

against Respondent which was dismissed by the Regional Director.

* Respondent argues the remark, if made, was but an educated guess based on observable events. I disagree on the facts. Were the statement of Kossen an educated guess, it was not readily apparent that this was so to either Parker or Utterback. Further, to the extent Respondent's cited case Meade Manufacturing Company, 164 NLRB 805 (1967), applies to the instant situation, I find its holding has been modified by PPG Industries, Inc., Lexington Plant, Fiber Glass Division, 251 NLRB 1146, 1147 (1980). There the Board, overruling prior case law, held, "The coercive impact of these questions is not diminished by the employees' open union support or by the absence of attendant threats." This approach in my view is clearly inconsistent with the implicit assumption in Meade that because the union activity was obvious, the remark by an agent of management that it was known to them was therefore not coercive

back as laid off rather then terminated and has held to its position that Utterback will be recalled when business volume will allow a third employee in the body shop. Second, contrary to the General Counsel's theory that seniority in lay off should have prevailed, Respondent has recently laid off a body shop employee out of seniority. Parker, with several years' seniority, was terminated while Sachse was retained. Indeed, Parker testified credibly that he had complained to Lewis that Sachse was being favored in work assignments at a time well before any union activity occurred. Thus, seniority as a basis for layoff was clearly not a practice in the body shop.

In light of the above, I find Respondent has proved it would have laid off Utterback irrespective of any animus it may have harbored against him because of his union activities. Therefore the General Counsel's prima facie case has been met. Accordingly, I shall dismiss the allegation in the complaint regarding the lay off of Utterack.

D. Remaining Allegations

The General Counsel's proposed bargaining order remedy and concomitant allegation of a violation of Section 8(a)(5) of the Act requires two separate legal conclusions: First, that the election be set aside—an issue I address, infra, second, that the quantum of unfair labor practices committed are of sufficient effect on employee sentiments as to prevent a new election from being fairly conducted and thus require a bargaining order based on alternative means of testing employee wishes. Even assuming the election was set aside, the single violation of the Act found, supra, is not sufficient to support a bargaining order. Because I do not believe Respondent's conduct would preclude a new election, should the present election be set aside, I shall dismiss the 8(a)(5) allegation and not issue a bargaining order.

In light of my initial determination regarding the propriety of a bargaining order, it is unnecessary for me to address further the remaining elements of the General Counsel's case with respect to these allegations. Thus, I shall make no findings regarding the number or validity of the authorization cards proffered by the General Counsel, the number and identity of employees in the unit at relevant times, or the circumstances of any demand for bargaining by the Union or subsequent refusal to bargain by Respondent.

IV. THE OBJECTIONS

The Union's objections state:

Employer discharged a union adherent after the filing of the petition, threatened its employees with reprisal if they voted for the union and interrogated its employees. By these and other actions the employer interfered with employees' free choice in the election.

The sole evidence adduced in support of the objections was that discussed, *supra*, concerning the alleged unfair labor practices. I have found that Respondent engaged in no misconduct occurring after the filing of the petition on October 1. Conduct occurring before a petition is filed is not a proper basis for setting an election aside.

The Ideal Electric and Manufacturing Company, 134 NLRB 1275 (1961). Accordingly, I shall recommend that the objections be found to be without merit and that the results of the election be certified.⁵

Upon the above findings of fact and the entire records herein, I make the following:

CONCLUSIONS OF LAW

- 1. Respondent is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act:
- 3. Respondent interfered with, restrained, and coerced employees in the exercise of their Section 7 rights by creating the impression among employees that their union activities were under surveillance, thereby violating Section 8(a)(1) of the Act.
- 4. Except as described above, Respondent has not committed any unfair labor practice as alleged in the complaint.
- 5. Respondent has not engaged in any conduct warranting the setting aside of the election conducted on October 24, 1980, in Case 17-RC-9127.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER⁶

The Respondent, Larry Lewis Motors, Inc., its officers, agents, successors, and assigns, Platte City, Missouri, shall:

- 1. Cease and desist from:
- (a) Creating the impression among employees that their union activities are under surveillance.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.
- 2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:
- (a) Post at its Platte City, Missouri, facility copies of the attached notice marked "Appendix." Copies of said

⁸ This recommendation, if adopted by the Board, further precludes any direction of a bargaining order or finding of an 8(a)(5) violation.

⁶ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

⁷ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notice, on forms provided by the Regional Director for Region 17, after being duly signed by its authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

It is further ordered that the complaint, save insofar as sustained above, be, and it hereby is, dismissed in all other respects, and all motions inconsistent with the above are hereby denied.

IT IS FURTHER ORDERED that the Union's objections be dismissed and that the results of the election conducted by the Board in Case 17-RC-9127 be certified.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT create the impression among our employees that their union activities are under surveillance.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

LARRY LEWIS MOTORS, INC.